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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 593

PERPETUAL BUILDING AND LOAN ASSOCIATION, FOR ITSELF AND ON BEHALF OF ALL OTHER SHARE-HOLDERS AND THE DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION WHO WISH TO BE REPRESENTED AS PLAINTIFFS IN THIS ACTION, PETITIONER

v.

SERIES DIRECTORS OF EQUITABLE BUILDING AND LOAN ASSOCIATION, SERIES NO. 52, AUGUST KOHN AND CO., C. W. HAYNES AND CO., INC., GREAT SOUTHERN INSURANCE CO., AND FEDERAL NATIONAL MORTGAGE ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of South Carolina (R. 10–13) is unreported. The opinion of the Court of Appeals

for the Fourth Circuit (Pet. App. 1a–9a) is reported at 217 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1954 (Pet. App. 10a). The petition for a writ of certiorari was filed on February 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether respondent Federal National Mortgage Association, an agency of the federal government, by intervening as a defendant in petitioner's state court litigation, waived its right to remove the proceeding to the appropriate federal district court.

STATUTES INVOLVED

Sections 451, 1441, and 1442 of Title 28 of the United States Code, in pertinent part, provide:

> § 451. Definitions.
> As used in this title:
> * * * * *
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.
> § 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of a State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

§ 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the

United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

STATEMENT

Petitioner, Perpetual Building and Loan Association, a South Carolina corporation, commenced this action in a South Carolina state court, claiming, *inter alia,* that employees of Federal National Mortgage Association (FNMA) had illegally terminated a FNMA mortgage servicing contract in which Perpetual asserted an interest (R. 3–6). Instead of bringing suit against FNMA, a wholly owned federal government agency, petitioner named as defendants the newly appointed FNMA servicing agents, and sought an injunction to prevent them from acting in that capacity. On the day the suit was filed, the state court granted petitioner a temporary restraining order (1) forbidding the newly named agents from continuing to service certain mortgages owned by FNMA and (2) appointing petitioner to act in their place (R. 2–3). FNMA was then granted leave to intervene in the state court action so as to enable it to protect its property rights in the mortgage payments which, under the state

court's order, were to be collected, *pendente lite,* by petitioner (R. 17–18; 7–8).

FNMA immediately removed the case to the United States District Court for the Eastern District of South Carolina (R. 1–2). In that court, FNMA moved to vacate the state court's temporary restraining order (R. 8) and petitioner moved to remand the action to the state court (R. 9). The district judge, on the basis of a record which included the pleadings and orders in an earlier suit involving the same dispute, entered an order (1) dissolving the temporary restraining order, and (2) denying petitioner's motion to remand (R. 10–13). Petitioner appealed from this order and the Court of Appeals unanimously affirmed (Pet. App. 1a–10a).

The detailed facts relating to the issuance of the challenged district court order may be summarized as follows:

1. *Federal National Mortgage Association (FNMA) and its Mortgage Servicing Contracts.* FNMA is a wholly owned corporation of the United States, organized under an Act of Congress, 48 Stat. 1252 (as amended), 12 U. S. C. 1716, to purchase, service, and sell mortgages which are guaranteed by the Administrator of Veterans Affairs or insured by the Federal Housing Commissioner. In servicing its mortgages, FNMA enters into written agreements with various qualified persons or corporations who collect

the mortgage payments and perform other duties in connection with the mortgages, as prescribed by the servicing agreements, in exchange for a servicing fee of one half of one per cent of the mortgage payments collected.

On June 3, 1952, FNMA entered into a servicing contract with Equitable Building and Loan Association (R. 20), a South Carolina corporation in which petitioner Perpetual claims to be a substantial stockholder (R. 3). This contract related to approximately 300 mortgages whose principal sum exceeded $1,400,000 (R. 17). The written servicing agreement between FNMA and Equitable, contained, *inter alia*, the following provision, which provided for a right of termination by FNMA (see Pet. App. 2a):

> The Association, on thirty-days' written notice to Seller [*i. e.*, Equitable] may terminate the servicing duties which Seller agrees to perform in Part B hereof, as to one or more specific Mortgages or as to all Mortgages; and the Association may elect at any time to withdraw a delinquent Mortgage from further servicing. If Seller violates any provision of this Agreement (except paragraph 1 in Part B), the Association, on one day's written notice, may terminate the servicing duties which Seller agrees to perform in Part B hereof.

Thereafter, pursuant to its rights under this provision, FNMA gave Equitable a thirty-day notice of termination, dated March 18, 1954, to be effective on April 23, 1954. Arrangements were then

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made with respondents August Kohn a
Haynes and Co., Inc., and Great So
ance Co., to assume the servicing of the
under a new set of servicing agreements
were sent by FNMA to each of the 30
directing them to make payments on
gages after May 1, 1954 to the new se
nated in that notice (R. 21).

and Co., C. W.
uthern Insur-
ese mortgages
ts, and notices
0 mortgagors
n their mort-
ervicer desig-

2. *The First Suit.* The day after
arrangement with Equitable had been
Charles F. Cooper,[1] allegedly as a
Equitable, filed an action in the Rich
Court of South Carolina against
Greer (an agent of FNMA), Augus
Co., C. W. Haynes and Co., Inc.,
Southern Insurance Co. (R. 26–29).
land County Court immediately issue
rary restraining order and an order to
why a permanent restraining order
be issued to prevent the named defen
collecting any of the mortgage payme
tion or from doing anything which w
fere with Equitable's "continued hand
mortgage loans and accounts for the F
tional Mortgage Association in the
said plaintiff is doing and has done
execution and effective date of said
(R. 29–30).

the servicing
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attorney for
land County
Frank H.
st Kohn and
and Great
The Rich-
ed a tempo-
o show cause
should not
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would inter-
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Federal Na-
manner as
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l contract"

On the same day Equitable appea
ared in the

[1] Mr. Cooper is president of petitioner Perpe
etual (R. 7).

Richland County Court, by its president J. Donald Dial, to challenge the institution of the action, since Equitable had neither authorized nor consented to the bringing of the suit, and to request that the action be dismissed, since Equitable recognized the authority of FNMA to cancel its servicing agreement (R. 35). Instead of dismissing the action the county court ordered an amendment of parties, naming Equitable as an additional defendant and substituting Charles F. Cooper and Paul C. deTreville as plaintiffs (R. 30–31), even though the complaint made no allegation whatsoever as to any injury to these new plaintiffs. On the following day, once again on motion by Mr. Cooper, the county court substituted for Messrs. Cooper and deTreville the name of Perpetual Building and Loan Association as plaintiff (R. 31–33).

Immediately thereafter, Frank H. Greer (the agent of FNMA) filed a petition in the United States District Court for the Eastern District of South Carolina to remove the case to that court (R. 37) on the ground that he was being sued in his capacity as an agent for the United States Government. A short time later, FNMA filed a motion in the District Court to be made a party defendant under F. R. C. P. 24 alleging that it was a necessary party and the real party in interest, and permission to intervene was granted (Pet. App. 4a). Perpetual then filed a motion to remand. After a hearing held May 21, 1954, the district judge ruled that

the action was one against an agency of the United States and was therefore properly a matter for the jurisdiction of the federal court (R. 38), and determined that the restraining order issued by the Richland County Court was improvidently granted, since "the litigation of the rights of Federal National Mortgage Association without its appearance in that action in the Richland County Court is repugnant" (R. 39). Since the complaint originally filed had never been amended so as to state a cause of action in favor of Perpetual, the District Court dismissed the action (R. 39–40), entering its order of dismissal May 25, 1954.

3. *The Second Suit.* Apparently disregarding the District Court's determination that FNMA was an indispensable party to the action, Mr. Cooper filed a new complaint in the name of Perpetual, for itself and purportedly on behalf of others, in the Richland County Court on May 24, 1954, but without joining FNMA or its agent Frank H. Greer as defendants. The new complaint (R. 3–6) was almost identical to that in the previous action, except as to parties.[2] In addition to the deletion of FNMA's agent Greer from the list of defendants, the new complaint stated it was "on behalf of all other share-

[2] The theory of the complaint appears to be a shareholder's derivative suit on behalf of Equitable. However, Equitable was not joined as a party plaintiff or defendant even though the corporation is almost always considered an indispensable party to such an action.

holders and the directors of Equitable Building and Loan Association who wish to be represented as plaintiffs in this action" and added as parties defendant "Series Directors of Equitable Building and Loan Association, Series No. 52."

Once again, the president of Equitable, J. Donald Dial, filed an affidavit in the county court disclaiming any interest by Equitable or its directors in this action; his affidavit (R. 16–17) stating that "according to his information and belief no other director of Equitable Building and Loan Association has authorized the institution of this suit, nor do any of them wish to be represented as plaintiffs herein." The affidavit further stated that the corporate structure of Equittable does not provide for Series Directors and that "the designation as Series Directors of Equitable Building and Loan Association, Series No. 52 is spurious, fictitious and without substance neither identifying nor describing any person, persons, firm or corporation" (R. 16–17). The Richland County Court again issued an immediate restraining order, this time, however, authorizing Perpetual to collect the mortgage payments due and owing to FNMA and enjoining the defendants from interfering with such collections (R. 2–3).

Upon the institution of the second suit, the named defendants, with the exception of the fictitious Series Directors, filed a petition for removal to the federal district court on the ground that they were being sued in their capacity as agents

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of an agency of the United States Government, but the District Court found the removal improper and remanded to the Richland County Court (Pet. App. 5a). Thereupon, on June 4, 1954, FNMA petitioned the Richland County Court to be made a party defendant in accordance with South Carolina procedure, South Carolina Code of Laws, Section 10–219, stating that the action affected mortgages which then were the property of FNMA (R. 17). After a hearing, the county court, on June 14, 1954, determined that "the Federal National Mortgage Association is a necessary party" and granted the motion to intervene (R. 18).

Immediately upon being admitted as a party defendant, on June 14, 1954, FNMA filed a petition to remove the case to the United States District Court for the Eastern District of South Carolina on the ground that FNMA is an agency of the United States Government and that the controversy is one arising under the laws of the United States (R. 1). An amended petition for removal was subsequently filed by all defendants, except the fictitious Series Directors, and allowed by the District Court (R. 25–26; Pet. App. 9a). On June 15, 1954, FNMA filed its answer to the complaint (R. 19–24), and on June 16, 1954, Perpetual filed a motion to remand the action to the Richland County Court (R. 9).

This time the District Court determined that the removal was proper and that the restraining

order issued by the Richland County Court was without basis and should be dissolved (R. 10–13). The District Court concluded that "Federal National Mortgage Association was forced to go into the State Court proceedings to protect its property rights and is a defendant within the meaning of the Removal Statute and is entitled to bring the case into this court"[2a] (R. 11–12). On appeal, the Court of Appeals for the Fourth Circuit affirmed. With respect to the questions presented by the petition for certiorari, that court determined that FNMA had not waived its right of removal by intervening in the state court and that the case involves a federal question which serves as a basis for the removal (Pet. App. 1a–9a).

ARGUMENT

An examination of the proceedings below shows that petitioner has twice sought judicial interference with contracts between FNMA and the other respondents and, in this action, an order authorizing petitioner to act as the servicer of FNMA's mortgages without that agency's authorization or permission. It is clear in each

[2a] Petitioner's unsupported claim that FNMA's property rights are not affected by this suit (Pet. 3) is patently erroneous. This was likewise recognized by the Court of Appeals, which noted that "control of FNMA over its property had been completely taken out of the hands of FNMA by the State Court injunction and, according to FNMA, had been placed in the hands of a person not authorized to exercise such control" (Pet. App. 8a).

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proceeding that FNMA was an indispensable party since the relief sought, and temporarily granted by the state court, prevented FNMA from using mortgage servicers which it had selected and, in the second suit, forced FNMA to utilize petitioner as its sole servicer for the mortgages in question. Cf. *Shields* v. *Barrow*, 17 How. 130; *Northern Ind. R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233. Yet, in each case, petitioner attempted to exclude FNMA from the proceedings. Regardless of petitioner's technical objections, the ultimate result of this case can only be the recognition of the government agency's standing to intervene in this litigation as a necessary party, and its right to have the temporary restraining order vacated—the conclusions reached by both federal courts below.

1. As the District Court stated in denying petitioner's motion to remand (R. 12): "* * * the only real party in interest as a defendant is Federal National Mortgage Association, and it should have been made a party defendant from the inception of the case, and plaintiff's omission was patently to circumvent the jurisdiction of this Court, and to further litigate matters already adjudicated."

On the facts of this case, petitioner is in no position to challenge the validity of the removal of its second action. The propriety of the removal was finally settled by the District Court's decision on this question in the first proceeding,

where the suit was removed by FNMA's agent, Greer, on the basis that FNMA was the real party in interest. It is fundamental to judicial procedure that the entry of judgment by a court precludes any collateral attack upon determinations leading to that judgment by the parties to that action. See *Restatement, Judgments,* Sec. 1. Thus, in this case, petitioner Perpetual, the substituted plaintiff in the first suit, is prevented from attacking the first judgment, which could only have been challenged by an appeal taken in that suit to the Court of Appeals for the Fourth Circuit. Instead of taking such an appeal, petitioner attempted by this new and substantially identical action in the Richland County Court to avoid the force of the District Court's decision by making artificial and fictitious changes (R. 16–17) in the designation of defendants. However, after admission of FNMA as a party defendant in the second suit, the parties involved and the alleged cause of action were identical to those in the first suit which had been previously dismissed by the District Court.[3] It is therefore clear that, to the extent that petitioner sought and seeks to relitigate in its second state court proceeding the

[3] There was, of course, the addition of the fictitious "Any Other Directors of Equitable Building and Loan Association Who Wish to be Plaintiffs" and "Series Directors of the Equitable Building and Loan Association, Series No. 52." Since the president of Equitable stated in his uncontroverted affidavit that no such persons exist and both courts below

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issues resolved in its first case, it is barred by the doctrine of *res judicata*. Thus, it is precluded from here relitigating the removability of this suit to the federal district court.

This conclusion is required even though the issue as to the propriety of removal is a jurisdictional question, for this Court has repeatedly announced that the doctrine of *res judicata* applies to a court's determination of its jurisdiction. *Baldwin* v. *Traveling Men's Association,* 283 U. S. 522; *Stoll* v. *Gottlieb,* 305 U. S. 165. Indeed, the same result would be required even if the jurisdictional issue had not been explicitly litigated and ruled upon in the first action (R. 38–40). *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; *Jackson* v. *Irving Trust Co.,* 311 U. S. 494. It is true that in a few instances collateral attack has been allowed upon a jurisdictional determination when grave policy considerations were considered to outweigh the otherwise accepted principles. *E. g., Kalb* v. *Feuerstein,* 308 U. S. 433 (state interference with federal bankruptcy proceedings in face of clear statutory prohibition); *United*

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concluded this to be the fact, the addition of these fictitious parties does not effect ordinary rules of *res judicata.*

It should be noted that, even if the formal identity of parties between the first and second state court actions had not been established by intervention, no different result would be required under the applicable principles of *res judicata.* As the courts below recognized, the real controversy here at all times has been between petitioner and FNMA, the two real parties in interest (R. 12; Pet. App. 9a).

States v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (entry of judgment against the United States in face of the strong constitutional protection of sovereign immunity). No such overriding policy argues for collateral attack here; rather, the application of the rules of *res judicata* are especially appropriate in this case, in view of the District Court's decision that petitioner's second action in the Richland County Court was patently intended to circumvent the jurisdiction of the federal court and its previous decision (R. 12).

2. With respect to petitioner's contention that the removal was improper, even assuming that it could be raised in this case, the decision below is clearly correct. A suit by or against a government corporation wholly owned by the United States arises under the laws of the United States for the purpose of removal jurisdiction under 28 U. S. C. 1441, *supra*, pp. 2–3. *Machine Tool & Equipment Corp.* v. *R. F. C.*, 131 F. 2d 547 (C. A. 9); *Sabin* v. *HOLC*, 147 F. 2d 653 (C. A. 10), certiorari denied, 326 U. S. 759; cf. *FDIC* v. *George-Howard*, 153 F. 2d 591 (C. A. 8), certiorari denied, 329 U. S. 719.[4] This doctrine, stemming from *Osborn* v. *Bank of United States*, 9 Wheat. 738, although congressionally narrowed at times with regard to particular types of cor-

[4] See also *Pacific Railroad Removal Cases*, 115 U. S. 1; *Matter of Dunn*, 212 U. S. 374; *Bankers Trust Co.* v. *Texas & P. Ry. Co.*, 241 U. S. 295; *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350.

porations (see *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 485), has complete vitality where, as here, the United States owns all of the corporation's stock. See *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U. S. 213.

In addition to removal jurisdiction under 28 U. S. C. 1441, it should be noted, as pointed out by the District Court (R. 12), that alternative authority for removal may lie in 28 U. S. C. 1442 (a) (1), *supra*, pp. 3–4, since FNMA is an agency of the United States as defined by 28 U. S. C. 451, *supra*, p. 2.

3. Petitioner argues that FNMA's intervention in the state court proceedings acted as a waiver of its right to remove the case. But, as was noted by both courts below (R. 11–12; Pet. App. 7a–8a), intervention in the state action was FNMA's only means of protecting its receipts on its mortgages and preserving its servicing contracts with the other defendants. FNMA's purpose in intervening was to achieve this protection, not to waive any rights. Removal proceedings, which rounded out the protective course, were begun the same day that intervention was allowed.[6]

Petitioner also contends that FNMA was not an indispensable party to the state suit, in the face of contrary decisions by the District Court

[6] Upon intervention, FNMA had the necessary status of defendant for the purpose of 28 U. S. C. 1441. Examination of the cases shows that obtaining the status of defendant by intervention has never been treated as preventing the intervenor-defendant from invoking removal procedure.

(on two separate occasions) and the Court of Appeals (R. 12, 39; Pet. App. 9a). The District Court concluded not only that FNMA was a necessary and indispensable party but, indeed, that FNMA was the only real defendant in interest (R. 12). The money being collected by petitioner under the state court restraining order concededly belongs to FNMA, and although petitioner contends that the state order has no effect on FNMA's right to contract, it is obvious that the restraining order prevented FNMA from using the mortgage servicers which it has selected.

Moreover, the question whether FNMA is an indispensable party or the only real party in interest would have relevance only if the basis for the removal petition were diversity of citizenship. Cf. *Barney* v. *Latham,* 103 U. S. 205. Here, where the basis of removal was not diversity, it is sufficient that FNMA was a proper party, an issue on which there can be no question.

4. Finally, petitioner relies upon three decisions of this Court and a decision of the Court of Appeals for the Eighth Circuit as directly conflicting with the opinion below, *viz., Cable* v. *Ellis,* 110 U. S. 389; *Gulley* v. *First National Bank,* 299 U. S. 109; *Phelps* v. *Oaks,* 117 U. S. 236; *Division 525, Order of Railway Conductors of America* v. *Gorman,* 133 F. 2d 273 (C. A. 8). The *Phelps* and *Gorman* cases stand for the well-established proposition that once a case has been

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validly removed to a federal court for diversity of citizenship, the court will not lose jurisdiction over the case by admitting additional parties whose citizenship would have destroyed the essential diversity before removal. Neither case makes any reference to the right of an intervenor-defendant to remove a cause, or to the alleged lack thereof. *Cable* v. *Ellis* ruled that a substitute party (not an independent intervenor) who was admitted to a state proceeding several years after its inception and after it has been through numerous state courts had no greater right to remove than his predecessor who had long since lost that right. And in *Gulley* v. *First National Bank* this Court specifically recognized that federal incorporation was a ground for federal jurisdiction where the United States holds more than one-half the stock (299 U. S. at 113) and stated that although the "charter cases" were to be treated as exceptional, within their special field, "there was no thought to disturb them" (299 U. S. at 114).[6] None of the four cases relied upon is authority for the position urged by petitioner.

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[6] In the *Gulley* case, the court repeated the oft applied rule that a cause is not removable unless the necessary allegations of the complaint alone establish the district court's jurisdiction. That proposition has no application to the present case in which the action, as modified by the order granting intervention, creates a federal question by seeking relief from a government corporation, FNMA. It should be noted that courts take judicial notice of FNMA's status as a government corporation although that fact is not specifically pleaded. Cf. *Matter of Dunn*, 212 U. S. 374.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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